

No. 14380

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United States  
Court of Appeals  
for the Ninth Circuit

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E. S. McKENDRY and PANCHO BARNES, also  
known as Florence Lowe Barnes and as Florence  
Lowe Barnes McKendry,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Supplemental  
Transcript of Record

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Appeals from the United States District Court for the Southern  
District of California, Central Division

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In the United States District Court, Southern District of California, Northern Division

No. 1253-ND—Civil

UNITED STATES OF AMERICA,      Plaintiff,

vs.

360 ACRES OF LAND IN THE COUNTY OF  
KERN, State of California; FLORENCE  
LOWE BARNES, et al.,      Defendants.

NOTICE OF APPEAL TO THE COURT OF  
APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that E. S. McKendry, Pancho Barnes (also known as Florence Lowe Barnes), William Emmert Barnes, defendants above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order dated March 19, 1954 in which the Honorable Court's decision and ruling was that the defendants by the acceptance of monies as deposited by the government for their use without prejudice did constitute a "waiver of objections to the taking".

The Court having denied the defendants motion to dismiss the action and motion to set aside the declaration of taking predicated on the opinion that the defendants had waived their rights to contest the government action is directly opposed both to the law and to the representation and interpretations of the law as made by the government attorney and representatives to the defendants.

Furthermore notice is hereby given by the above

named defendants from the order dated March 19, 1954 granting plaintiffs motion for possession and from the order dated May 10, 1954 modifying the order dated March 19, 1954 with respect to the date of possession, made and entered in this cause by the Honorable Campbell E. Beaumont, Judge of the above entitled Court.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Appellants in Propria Persona

[Endorsed]: Filed May 17, 1954.

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[Title of District Court and Cause.]

#### UNDERTAKING FOR COSTS ON APPEAL

Whereas, E. S. McKendry, Pancho Barnes and William Emmert Barnes, Defendants in the above entitled action are about to appeal to the Circuit Court of Appeals for the Ninth Circuit from judgment dated March 19, 1954, denying defendants motion to dismiss the action and denying defendants' motion to set aside the declaration of taking and granting plaintiff's motion for possession, in the District Court of the United States, for the Southern District of California, Northern Division

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Company, a cor-



poration organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellants that said Appellants will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 14th day of May, 1954.

[Seal]            National Automobile and Casualty  
                    Insurance Company,  
/s/ By William E. Fortney, Attorney-in-Fact

Examined and recommended for approval as provided in Rule 8.

I hereby approve the foregoing bond. Dated the 17th day of May, 1954. Edmund L. Smith, Clerk, U. S. District Court, Southern District of California; signed by Charles E. Jones, Deputy.

Affidavit of Verification attached.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

Come now the appellants and pursuant to Rule 75 (a) R. C. P., designate the following as the contents of the record on appeal.

1. Complaint in Condemnation.
2. Declaration of Taking.
3. Decree on Declaration of Taking.
4. Motion to Dismiss.
5. Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment entered thereon.
6. Supplemental Amendment to Motion to Dismiss.
7. Supplemental Amendment to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment.
8. Notice of Motion for an Order of Immediate Possession.
9. Defendant's Memorandum in Opposition to Plaintiff's Application for Order of Immediate Possession.
10. Petition for Partial Distribution of Compensation Pursuant to Section 258a, Title 40, USC, filed March 11, 1953.
11. Petition for Partial Distribution of Compensation, dated March 26, 1953.
12. Memorandum of Opinion and Orders.
13. Order Modifying Order for Immediate Possession.

14. Notice of Appeal to Court of Appeals for the Ninth Circuit under Rule 73(b) and Title 28 U.S.C.A. (Revised) Section 1292.

15. Undertaking for Costs on Appeal.

16. This Designation.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona

Acknowledgment of Service attached.

[Endorsed]: Filed July 9, 1954.

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[Title of District Court and Cause.]

## COUNTER-DESIGNATION OF THE RECORD ON APPEAL

Comes Now plaintiff and appellee, United States of America, and pursuant to the provisions of Rule 75(a) designates the following additional portions of the record and proceedings for inclusion in the record on appeal in the above entitled action.

This counter-designation is in response to the designation of the record on appeal filed by appellants July 9, 1954.

1. Order on petition for partial distribution of compensation pursuant to Section 258a, Title 40, USCA, filed March 11, 1953;

2. Order on petition for partial distribution of compensation pursuant to Section 258a, Title 40, USCA, filed March 31, 1953;



3. Receipt and partial satisfaction executed by E. S. McKendry, as Trustee, for \$172,753.76, filed March 13, 1953;

4. Receipt and full satisfaction of judgment executed by the Farmers and Merchants Bank of Long Beach for \$12,246.24, filed March 21, 1953;

5. Receipt executed by Bureau of Internal Revenue for \$7,560.95, filed April 17, 1953;

6. Receipt executed by State of California, Department of Employment, for \$1,841.78, filed April 17, 1953;

7. This counter-designation.

Dated: July 19, 1954.

LAUGHLIN E. WATERS,

United States Attorney

A. WEYMANN,

Assistant U. S. Attorney,

/s/ By A. WEYMANN,

Attorneys for Plaintiff-Appellee

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 19, 1954.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 9, inclusive, contain the original Notice of Appeal; Designation and Counter-



Designation of Record on Appeal and Motion and Order Extending Time to Docket Appeal which, together with the Transcript of Record on Appeal in Cause No. 14380 in the United States Court of Appeals for the Ninth Circuit constitute the transcript of record on this appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13th day of August, 1954.

[Seal]                      EDMUND L. SMITH,  
                                    Clerk  
/s/ By THEODORE HOCKE,  
                                    Chief Deputy

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[Endorsed]: No. 14380. United States Court of Appeals for the Ninth Circuit. E. S. McKendry and Pancho Barnes, also known as Florence Lowe Barnes and as Florence Lowe Barnes McKendry, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: August 16, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14380

E. S. McKENDRY and PANCHO BARNES,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

### STATEMENT OF POINTS

To: The Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

1. The District Court erred in his preliminary statement in the Memorandum of Opinion and Orders dated March 19th, 1954, wherein the District Court stated "it is clear that the acceptance of such amount constitutes a waiver of objections to the taking".

2. The District Court erred in denying the defendant's "Motion to Dismiss" the condemnation suit as predicated on his decision that the defendants had made a "waiver of objections to the taking".

3. The District Court erred in denying the defendant's "Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment" as predicated on his decision that the defendants had made a "waiver of objections to the taking".

4. The District Court erred in his denial of the

defendant's Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment despite overwhelming evidence that the estimate of "just compensation" was obviously far below any possibility of replacing the installation, let alone "just compensation" for the property. The property was taken without just compensation. Had the "estimate" been sufficient to replace said property then it might be assumed that the plaintiff's credit would be good for any balance as decided by a condemnation suit. But the 5th Amendment of the Constitution says "nor shall private property be taken for public use without just compensation". The Constitution has been violated in this case to such a degree that the "estimate" was so low as to constitute an estimate made in bad faith and a hardship on the defendants wherein they did not receive the protection of the Constitution of the United States which is their acknowledged birthright as citizens of the United States of America. (Emphasis added.)

5. The District Court erred in granting the plaintiff possession of the property as by his own finding and opinion it clearly shows that the plaintiff had no immediate or in fact any necessity for the property. Therefore possession of the property should not have been granted unless a necessity should be shown and or a condemnation suit be entirely disposed of.

6. The District Court erred in denying the defendant's Motion to Dismiss the condemnation suit.



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5. The District Court erred in granting the plaintiff possession of the property as by his own finding and opinion it clearly shows that the plaintiff had no immediate or in fact any necessity for the property. Therefore possession of the property should not have been granted unless a necessity should be shown and or a condemnation suit be entirely disposed of.

6. The District Court erred in denying the defendant's Motion to Dismiss the condemnation suit.

7. The District Court erred in denying the defendant's Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment.

8. The District Court erred in granting the plaintiff's Motion for possession of the property.

Signed and dated this 11th day of September, 1954.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 13, 1954. Paul P. O'Brien, Clerk.